Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1279

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CINCINNATI FIREFIGHTERS UNION,
LOCAL UNION NO. 48
Petitioner

v.

TILFORD YOUNGBLOOD, et al.
and
JOHN W. DALZELL, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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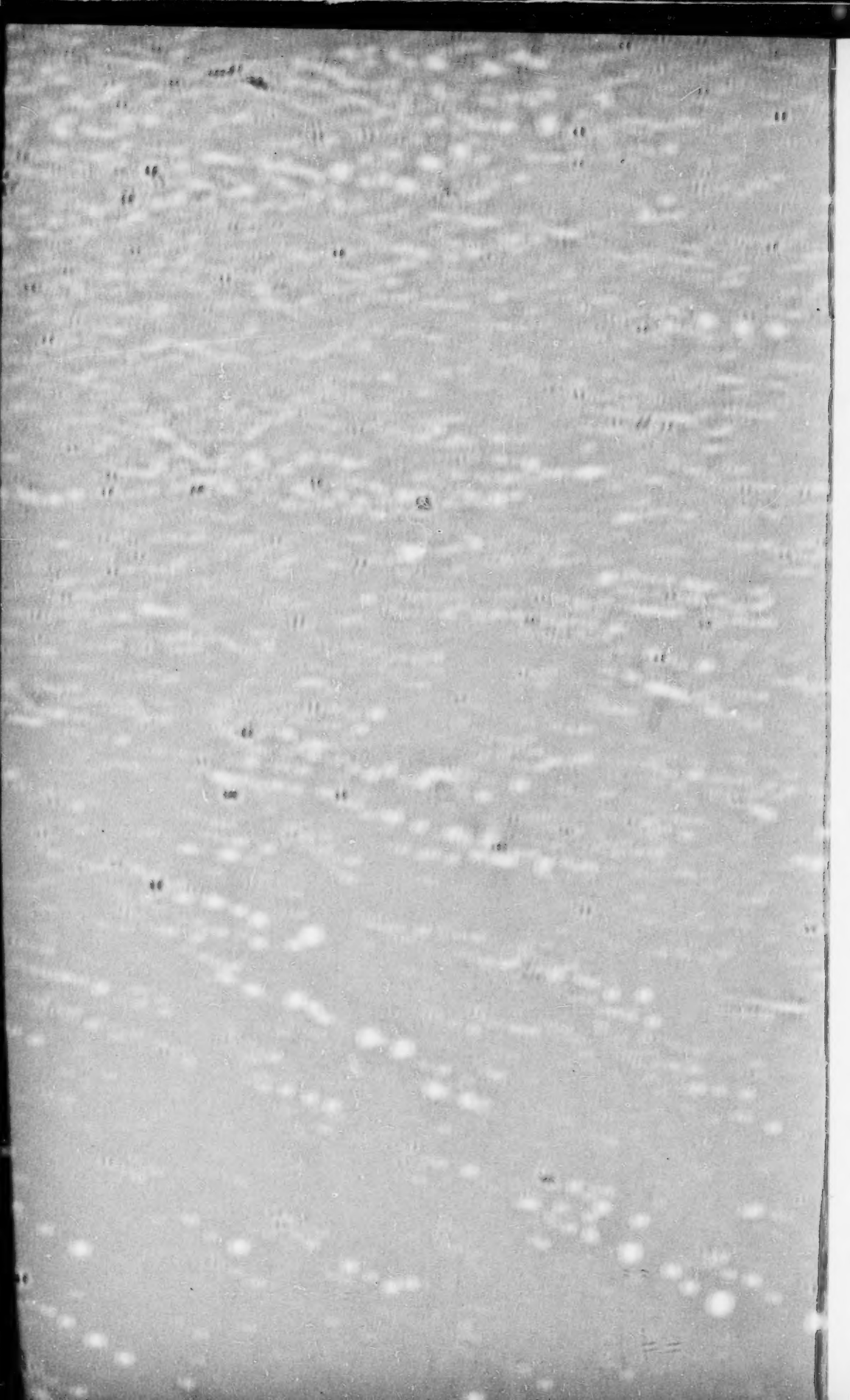

QUESTION PRESENTED FOR REVIEW

Whether the Fourteenth Amendment permits race to serve as a basis for a preference for promotions in government service where the government employer has obligated itself by a consent decree to remedy underrepresentation of minorities within its workforce, and where the results of a competitive examination for promotion within the workforce will produce minimal minority advancement.

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Court of Appeals were: Cincinnati Firefighters Union, Local No. 48, Intervenor-Appellant; Tilford Youngblood and Ralph Nichols, Plaintiffs-Appellees and the class they represent; and John W. Dalzell, Harold Latimer, Arthur Hull, William Clark, Henry J. Sandman, and Bert A. Lugannani, Defendants-Appellees, all of whom were officials of the City of Cincinnati.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, John W. Dalzell, et al., respectfully pray that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 7, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 804 F.2d 360, and is reprinted in petitioner's Appendix A, pp. 1a-12a.

The memorandum decision of the United States District Court for the Southern District of Ohio is reported at 625 F. Supp. 30, and is reprinted in petitioner's Appendix B, pp. 13a-24a, and its Order for Compliance in petitioner's Appendix C at pp. 25a-28a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1986 and is reprinted in petitioner's Appendix D, p. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

By statute in Ohio, fire department vacancies in positions above the rank of "regular fireman" must be filled by competitive promotional examinations. The relevant portions of the Ohio Revised Code (ORC Sections 124.37, 124.45, 124.46, and 124.48) are set forth in petitioner's Appendix E, pp. 31a-35a.

STATEMENT OF THE CASE

1. Statement of Facts

Respondents Tilford Youngblood and Ralph Nichols (hereafter "Youngblood") were black applicants for employment with the Fire Division of the City of Cincinnati who brought this suit as a class action to the trial court in 1973, alleging that the City of Cincinnati's policies in recruiting, testing, selecting and promoting firefighters were racially discriminatory in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sections 1981 and 1983. Respondents John Dalzell, et al. (hereafter the "City"), were the city officials named as defendants in the suit.

On May 7, 1974, without trial of the issues and with no admission of discrimination on the part of the City, the parties entered into a consent decree which was approved by District Judge David S. Porter. The decree provided for measures to be taken to avoid "an inference of a pattern or practice of discrimination" in the past. Specifically, as it relates to promotions, the decree at paragraph 27 provides:

> "Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race."

The order for compliance, which was at issue in both the District Court and Court of Appeals below, was based on paragraph 27.

2. The Proceedings Below

A. The District Court

In 1984, the City administered a promotional examination for the rank of Fire Lieutenant, the results of which were likely to perpetuate the underrepresentation of blacks in that rank if Ohio law governing promotions were followed.

Youngblood filed a motion for enforcement of paragraph 27 of the decree, requesting that the District Court order the promotion of black candidates at the rate at which they were represented in the applicant pool by a "double-fill" process. The City argued in support of the motion and the proposed promotion plan. Moreover, the City's legislative body had expressed its commitment to an affirmative action plan, stating in a resolution passed on October 10, 1984 that "blacks are underrepresented in the promoted ranks within the Fire Division." The City further provided statistical documentation demonstrating that as of October, 1984, only five of the 105 Fire Lieutenants were black. Pet. App. B, p. 14a. Finally, the City argued that, given the composition of candidates on the two-year eligibility list for Fire Lieutenant, not more than one black would achieve that rank.

Petitioner intervened to oppose entry of the consent order for compliance. The Court, however, after a hearing held on June 25, 1985, and over the union's objection, held that paragraph 27 of the decree mandates affirmative action in the area of promotions and that "the proposed double-filling plan is an acceptable mechanism for achieving greater minority representation in the promoted ranks." Pet. App. B, p. 17a.

The order of enforcement required that each sixth

vacancy be double-filled with the highest ranked black candidate on the eligibility list. The order also provided that when the 1984 promotional eligibility list expired, "a vacancy for Civil Service purposes will not occur until all double filled positions are absorbed into the complement." Pet. App. C, p. 27a. Finally, the order provided that it would dissolve upon expiration of the current eligibility list.

Petitioner thereafter appealed the Court's decision to the Sixth Circuit Court of Appeals.

B. The Court of Appeals

Petitioner argued on appeal that the district court exceeded its authority in approving the order for compliance by relying solely on the disparity in test results to justify such an affirmative action plan. Respondents denied that the order was based upon bare statistics, asserting that paragraph 27 of the decree contemplates such a system of promotions that would advance qualified minorities within the Fire Division.

Petitioner further argued that the "absorption" provision of the order for compliance, wherein the double-filled positions are absorbed into the complement upon attrition occurring after the expiration of the eligibility list, is sufficiently detrimental to nonminority firefighters to invalidate the order.

The Court of Appeals affirmed the judgment of the district court, finding that "the double filling plan did not 'unnecessarily trammel' the interests of white candidates for promotion." Pet. App. A, p. 11a. In distinguishing the decisions in both *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 104 S. Ct. 2576 (1984) and *Wygant* v. *Jackson Board of Education*,

____ U.S. ____, 106 S. Ct. 1842 (1986), the Court also found the order for compliance to be "manifestly reasonable" as a means for breaking "down the patterns of racial segregation that gave rise to the consent decree." Pet. App. A, p. 11a.

ARGUMENT

1. The consent order of compliance is countenanced by this Court's decision in *Firefighters Local No. 93 v. City of Cleveland,* and distinguishable from the Court's decision in *Wygant* and *Stotts.*

In its petition, the union argues that the district court exceeded its authority in entering the order for compliance. Citing *Wygant* v. *Jackson Board of Education*, ____ U.S. at ____, 90 L. Ed.2d at 271 (1986) petitioner maintains that the trial court failed to make sufficient findings to conclude that remedial action was necessary within the Fire Division. Petitioner further argues that *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 104 S. Ct. 2576 (1984) precludes the imposition of an affirmative action order not provided for within the four corners of the original consent decree, and prohibits the granting of preferential treatment to individuals not proven to be actual victims of racial discrimination.

The instant case is easily distinguishable from both *Stotts* and *Wygant*. Unlike the district court in *Stotts*, the trial court did not approve a modification of the original decree concerning a matter on which that decree was silent. Rather, the court ordered compliance with a specific provision of the decree (paragraph 27) that contemplated a system of promotions to increase minority representation within the Fire Division.

Additionally, the present case is distinguishable from *Stotts* and *Wygant* in that the disputed order does not affect any firefighter's seniority rights, nor does it involve layoffs. As a result of the absorption provision of the order the only detriment that inures to any firefighter is the delay in time before he or she may compete for a future vacancy in the rank of Fire Lieutenant. The re-

quirement for double filling did not deprive any white firefighter of a promotion whose rank order otherwise insured such promotion. Those positions double filled by black candidates were additional, temporarily unnecessary Lieutenant positions that the City agreed to fund in furtherance of the goals of the decree.

The foregoing plan is obviously less intrusive than those under consideration in *Wygant* and *Stotts* where nonminorities with greater seniority suffered job losses in layoff actions. Accordingly, "the actual burden shouldered by nonminority [employees] is relatively light." *Wygant*, *supra* at 1851, quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 484 (1980).

Finally, the district court's order enforcing the 1974 decree is not rendered invalid by either *Stotts* or *Wygant* on the grounds that the beneficiaries of that order were not identified as actual victims of discrimination.

In the recent decisions of *Sheet Metal Workers* v. *E.E.O.C.*, ____ U.S. ____, 106 S. Ct. 3019 (1986) and *Firefighters Local No. 93* v. *City of Cleveland*, ____ U.S. ____, 106 S. Ct. 3063 (1986), this Court disposed of similar "victim specificity" arguments. In *Firefighters*, the union argued in its petition for certiorari that a consent decree entered in a Title VII case is invalid if it benefits individuals who are not the actual victims of discrimination. This Court held, in making reference to *Sheet Metal Workers*, that "courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices." *Firefighters*, *supra* at 3072.

While the opinion does not address the legality of voluntarily-adopted remedies under the Fourteenth Amendment, this Court found in *Wygant* that race-

conscious plans, such as the order *sub judice*, will survive Equal Protection challenge if they are "justified by a compelling governmental interest," and are "narrowly tailored to the achievement of that goal." *Id.*, at 1846.

The subject Order for Compliance is constitutionally sound in both respects. The dearth of minorities in the promoted ranks of the City's Fire Division, as well as the legislative commitment expressed by the City's governing body, provide the requisite governmental concern for the promotion plan. Secondly, as discussed above, the plan is narrowly tailored in its purpose, and minimally intrusive to the interests of non-minority firefighters. Neither seniority nor order of layoff is directly affected by the order. Rather, it is only a brief delay in promotional possibilities that affects any firefighter with the imposition of the double fill plan. As the Court of Appeals concluded in its opinion, "[t]his is not too great a burden to impose upon the nonminority candidates in view of a long history of virtual exclusion of black firefighters from the promoted ranks." Pet. App. A, p. 12a.

CONCLUSION

The approval by the courts below of the Order for Compliance should be left undisturbed. The reasoning of the courts comports with this Court's decisions in *Firefighters Local No. 93* and *Sheet Metal Workers* in that the affirmative action plan is a reasonable means, adopted and agreed to by co-respondents, to remedy the under-representation of minorities within the fire service of the City, with negligible and speculative adverse consequence to nonminorities. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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